



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

PRICE DANIEL
ATTORNEY GENERAL

May 19, 1948

Hon. George H. Sheppard
Comptroller of Public Accounts
Austin, Texas

Opinion No. V-583

Re: The applicability of the
Texas motor fuel tax to
motor fuel purchased by
the U. S. Government and
ultimately used by the
Texas National Guard.

Dear Sir:

Your request for an opinion on the above
question reads in part:

"We have requests from Texas motor
fuel distributors for approval by this de-
partment of tax exempt sales of motor fuel
to the United States Government for use ul-
timately by the Texas National Guard.

"An inquiry addressed to Lieutenant
Colonel Burton E. Miles of the Texas Na-
tional Guard who is also serving in the
capacity of acting United States Property-
Disbursing Officer, reflects that the Fed-
eral Government has in fact been purchasing
the motor fuel used by the Texas National
Guard under Supply Contracts of the Pro-
curement Division, United States Treasury
Department, which contracts provide for the
exclusion of State taxes, but include Fed-
eral taxes. The motor fuel is paid for
with U. S. Treasury checks or vouchers pro-
cessed by the Fort Worth Finance Office,
United States Army, Fort Worth, Texas.
Lieutenant Colonel Miles stated that all
of the Motor fuel purchased with Federal
funds is used in Federal vehicles owned by
the Federal Government and bearing War De-
partment Registration numbers. It appears,
however, that these vehicles are assigned
to and used by the Texas National Guard.

"We are enclosing the letter from Lieutenant Colonel Miles explaining the transactions . . .

"We shall appreciate your advice as to whether or not the motor fuel used by the Texas National Guard is subject to the Texas tax."

Lieutenant Colonel Miles' letter discloses:

" . . . All units of the Texas National Guard are Federally recognized in the National Guard of the United States before any purchases are made . . . "

Article 7065b - 2 provides in part:

"(a) There shall be and is hereby levied and imposed (except as hereinafter provided) upon the first sale, distribution, or use of motor fuel in this State an occupational or excise tax of Four (4) cents per gallon or fractional part thereof so sold, distributed, or used in this State. Every distributor who makes a first sale or distribution of motor fuel in this State for any purpose whatsoever shall, at the time of such sale or distribution, collect the said tax from the purchaser or recipient of said motor fuel, in addition to his selling price, and shall report and pay to the State of Texas the tax so collected at the time and in the manner as hereinafter provided . . .

"(d) No tax shall be imposed upon the sale, use, or distribution of any motor fuel, the imposing of which would constitute an unlawful burden on interstate commerce and which is not subject to be taxed under the Constitution of the State of Texas and the United States. In the event this Article is in conflict with the Constitution or any law of the United States with respect to the tax levied upon the first sale, distribution, or use

of motor fuel in this State, then it is hereby declared to be the intention of this Article to impose the tax levied herein upon the first subsequent sale, distribution, or use of said motor fuel which may be subject to being taxed."

It is noted that purchases of motor fuel are made for only those units of the Texas National Guard that are federally recognized. Such units are a part of the National Guard of the United States (32 U. S. C. A. Sec. 4a) which in turn is a part of the Army of the United States (10 U. S. C. A. Sec. 2). The United States is empowered by its Constitution to maintain and operate its armed forces (Art. 1, Sec. 8) of which the federally recognized units of the Texas National Guard are a part.

Since the early case of McCulloch v. Maryland, 4 Wheat. 316, it has been the settled rule that states cannot exercise the right of taxation in respect to any of the instrumentalities which the government may create for the performance of its constitutional functions. It is true that the trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers. Penn. Dairies v. Milk Control Comm. 318 U. S. 261. However, it is still the law that any lawful function of the federal government in the performance of which the United States acts directly is constitutionally immune from State taxation, unless Congress consents. U. S. v. State of New York, 140 F (2) 608, affirmed 326 U. S. 572.

Congress has not given consent to the several states to exact a tax on motor fuel purchased by the United States for ultimate use by units of the Army of the United States, nor has it given its consent for the states to place the tax upon the use of such fuel by said units. We must, therefore, answer your question in the negative.

SUMMARY

The Texas Motor Fuel Tax (Art. 7065b, V. C. S.) is not applicable to motor fuel purchased by the United States Government for use by the Federally recognized Texas National Guard.

Yours very truly,

ATTORNEY GENERAL OF TEXAS

By


Edward M. Goolsby
Assistant

DMG:sh:mrj

APPROVED



ATTORNEY GENERAL